No. 96500-5

SUPREME COURT OF THE STATE OF WASHINGTON

No. 17-35932

United States Court of Appeals for the Ninth Circuit

T-MOBILE USA, INC.,

Plaintiff-Appellant,

v.

SELECTIVE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

BRIEF OF AMICUS CURIAE AMERICAN PROPERTY AND INSURANCE ASSOCIATION

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I. IDENTITY AND INTERESTS OF AMICI CURIAE

The American Property and Casualty Insurance Association ("APCIA") is the preeminent national trade association representing property and casualty insurers doing business in Washington, nationwide, and globally. APCIA was recently formed through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America. APCIA's members, which range from small companies to the largest insurers with global operations, represent more than 50% of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects their members and the policyholders they insure.

National Association of Mutual Insurance Companies (NAMIC) is the oldest property/casualty insurance trade association in the country with more than 1,400-member companies representing 41 percent of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders and write more than $253 billion in annual premiums. Our

members account for 54 percent of homeowners, 43 percent of automobile, and 35 percent of the business insurance markets. Through our advocacy programs, we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

II. QUESTION CERTIFIED

Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?

III. INTRODUCTION

In its opinion certifying this question to this Court, the Ninth Circuit Court of Appeals framed this case as one where "two competing principles under Washington insurance law . . . are at loggerheads": (1) the principle that "'an insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of [the agent's] real or apparent authority;'" and (2) the principle that a certificate of insurance ("COI") "is *not* the functional equivalent of an insurance policy, and it therefore *cannot* be used to amend, extend, or alter the coverage provisions of an insurance policy." *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 908 F.3d 581, 585 (9th Cir. 2018) (quoting

Chicago Title Ins. Co. v. Wn. State Office of Ins. Comm'r, 178 Wn.2d 120, 136, 309 P.3d 372, 379 (2013)) (emphasis in original).

But in view of insurance industry practice, nationwide precedent, and the underlying policy reasons surrounding additional insured coverage, these two principles are reconcilable. Simply put, where a COI expressly states that it "is issued as a matter of information only and confers no rights upon the certificate holder," and "does not amend, extend, or alter the coverage afforded by" the relevant insurance policy," an authorized agent's issuance of a COI mistakenly naming an entity as an "additional insured" does not, as a matter of law, constitute an "act[], contract[], or representation[]" sufficient to create coverage.

IV. STATEMENT OF THE CASE

APCIA adopts Selective's Statement of the Case in full.

V. ARGUMENT

This Court should answer the Ninth Circuit's certified question in the negative and determine that the 2012 COI, even if mistakenly issued by Selective's authorized agent, VDG, cannot be relied upon to create coverage for T-Mobile USA.

A. The COI at Issue Here Does Not Confer Substantive Rights under Washington and Nationwide Insurance Standards

It is axiomatic, under Washington law, that a certificate of insurance "is not the equivalent of an insurance policy." *Postlewait Const., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 100–01, 720 P.2d 805, 807 (1986); *see also Int'l Marine Underwriters v. ABCD Marine, LLC*, 165 Wn. App. 223,

233, 267 P.3d 479, 484 (2011) (same), *aff'd*, 179 *Wn.*2d 274, 313 P.3d 395 (2013). For the reasons set forth below, this Court should determine that the 2012 COI issued to T-Mobile USA did not create any coverage, regardless of whether Selective's authorized agent issued the COI..

1. The Form at Issue Here Does Not Confer Rights on a Policyholder.

Under normal circumstances, COIs are issued as a service to policyholders who need to demonstrate the existence of insurance coverage to a third party. Usually, insurance agents issue COIs, but sometime insurers will issue them. Although their practices regarding COIs may vary, nearly all use the industry-standard ACORD forms—as VDG did here. *See* **ER 831** (ACORD 25 form).

ACORD (the Association of Cooperative Operations Research and Development) is a nonprofit organization of insurance agents and companies that began issuing certificate of insurance forms in the early 1990s. *See Total Mech. Heating & Air Conditioning v. Employment Rels. Div.*, 50 P.3d 108, 111 n.4 (Mont. 2002). ACORD has 8,000 participating organizations, and three million of their forms have been downloaded in the last 10 years.[1] The specific form used here, the ACORD 25, is a COI that was "developed as a *non-binding* form issued to third parties as evidence of insurance of the named insureds." *Id.* (emphasis added). The plain language disclaimers on ACORD 25 forms tell the certificate holder that the COI "afford[s] no rights to the certificate holder," and that the holder must

[1] *See* http://www.acord.org (last accessed March 29, 2019).

therefore "'look to the policy to determine the extent of the coverage as well as any existing exclusions.'" Barry S. Marks and Ken Weinberg, *Insurance and Proof of Coverage: Are your Certificates of Insurance Worth Anything?*, 20 No. 6 LJN's Equip. Leasing J. 1, 3 (June 2001) (hereinafter "Marks & Weinberg") (quoting *Int'l Amphitheater Co. v. Vanguard Underwriters Ins. Co.*, 532 N.E.2d 493 (Ill. Ct. App. 1988)). Thus, at most, "an Acord 25 Form merely serves as documentation of insurance." *Williamson v. Premier Tugs, LLC*, No. 12-2277, 2015 U.S. Dist. LEXIS 176255, at *18 (W.D. La. Oct. 22, 2015); *see also Barton v. Higgs*, 674 S.E.2d 145, 148 n.1 (2009) (same).

Insurance treatises confirm that COIs like the ACORD 25 are solely informational documents. A COI "evidences the existence of the insurance policies to which it refers." *New Appleman on Insurance Law Library Edition*, §3.03A[2]. The policies, not the COIs, control coverage. *Id.* The COI "does not alone create any coverage or legal obligations between the insurer and the certificate holder." *Id.* The COI does not alter the terms of the policies to which it refers, nor is it an endorsement or rider to the policies. *Id.* "A standard certificate of insurance is not an insurance policy, nor is it equivalent to a policy." *Id.*

Because ACORD 25 form explicitly state that they do not confer any rights upon the holder, the COI issued to T-Mobile USA was issued for informational purposes and could not reasonably be interpreted to change the policy terms.

2. Selective or VDG Could Have Used Other Forms Without the ACORD 25's Disclaimers.

Even if the mere issuance of a COI could somehow be interpreted to confer coverage, the use of an ACORD 25 form here demonstrates that neither Selective nor VDG intended to confer coverage on T-Mobile USA. That is because ACORD has other forms, like the ACORD 27 (Evidence of Property Insurance form), that contain "significant" differences compared to the ACORD 25 form. *See Asousa P'ship v. Mfrs. Alliance Ins. Co.*, Bankr. No. 01-12295DWS, Adversary No. 03-1005, 2005 Bankr. LEXIS 2089, at *17 (E.D. Pa. Bankr. Sept. 23, 2005): "The ACORD 24 and 25 forms contain the following characteristics, particularly disclaimers which are not found in the ACORD 27:"

> (1) The upper right-hand corner . . . contains a statement that 'this certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below';
>
> (2) form contains an additional disclaimer about a third of the way down the page which reads, 'this is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Limits shown may have been reduced by paid claims';

> (3) The bottom right-hand corner . . ., where the insurance company 'promises' to notify the lessor if the policy is canceled, contains a disclaimer saying that the company 'will endeavor to mail' the notice 'but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives'; and
>
> (4) [Form] does not contain[] an explicit place for the certificate holder to be designated as 'additional insured' and 'loss payee' and, when present, such terms are usually placed in the box that describes the collateral or in the box that lists the certificate holder's name.

Id. (quoting Marks & Weinberg, *supra*, at 3-4). At least one court has decided that, "given the explicit purpose of the ACORD 27 form to bind coverage of an existing policy to an additional party, [there is] no doubt that Pennsylvania law would find the Evidence of Property Insurance to be such an unequivocal assertion . . . so as to bind [the insurer]." *Id.* at *19.

Here, the use of a form replete with disclaimers (the ACORD 25), as opposed to a form that does not contain similar disclaimers the ACORD 27 or a similar form, cannot reasonably be interpreted to confer coverage on T-Mobile USA by way of its use.

B. Jurisdictions Outside Washington Confirm that COIs Cannot be Reasonably Relied upon, and Do Not Independently Confer Coverage.

Courts across the country have concluded that parties may not reasonably rely on COIs containing the sort of unambiguous language disclaiming their authority and ability to expand coverage found in the 2012

COI issued to T-Mobile USA. *See H.E. Ins. Co. v. City of Alton*, 227 F.3d 802, 806 (7th Cir. 2000) (applying Illinois law); *Am. Hardware Mut. Ins. Co. v. BIM, Inc*., 885 F.2d 132, 139-40 (4th Cir. 1989) (applying West Virginia law); *Bouboulis v. Scottsdale Ins. Co.*, 860 F. Supp. 2d 1364, 1379 (N.D. Ga. 2012) (applying Georgia law); *Bailey v. Netherlands Ins. Co.*, 615 F. Supp. 2d 1332, 1336 (M.D. Fla. 2009) (applying North Carolina law); *Am. Country Ins. Co. v. Kramer Bros., Inc.*, 699 N.E.2d 1056, 1060 (Ill. Ct. App. 1998); *Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992); *W. Am. Ins. Co. v. Gutekunst*, 583 N.W.2d 548, 551 (Mich. Ct. App. 1998); *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).

Similarly, numerous courts have concluded that, because a COI does not confer any rights by itself, a certificate-holder must look to the language of the underlying policy to ascertain its rights under the policy, if any. *See Taylor v. Kinsella*, 742 F.2d 709, 711 (2nd Cir. 1984) ("[W]here a certificate or endorsement states expressly that it is subject to the terms and conditions of the policy, the language of the policy controls"); *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991) (noting the "majority view is that where a certificate of insurance, such as the ACORD certificate, expressly indicates it is not to alter the coverage of the underlying policy, the requisite intent is not shown and the certificate will not effect a change in the policy."); *Atlas Assur. Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381, 1386 (9th Cir. 1975) (noting that a certificate of insurance "is not, and does not purport to be, a policy, but states that a

policy covering the goods is in existence"); *United States Pipe & Foundry Co. v. United States Fid. & Guar. Co.*, 505 F.2d 88, 89 (5th Cir. 1974) ("A certificate issued to a lessor indicating that liability insurance has been acquired by the lessee does not constitute a contract between the lessor and the insurer."); *McKenzie v. New Jersey Transit R. Operation, Inc.*, 772 F. Supp. 146, 148 (S.D.N.Y. 1991); *Sears Roebuck & Co. v. Mut. Fire Marine & Inland Ins. Co.*, No. 87 C 6892, 1988 U.S. Dist. LEXIS 11195 (N.D. Ill. Oct. 3, 1998) (holding that certificate holder could not assert estoppel based on the certificate); *Pekin Ins. Co. v. Am. Country Ins. Co.*, 572 N.E.2d 1112, 1115 (Ill. Ct. App. 1991); *Lezak & Levy Whole Meats v. Ill. Em. Ins. Co.*, 460 N.E.2d 475, 477 (Ill. Ct. App. 1984) (noting "the general rule that a certificate of insurance does not constitute a contract between the parties"); *Progressive Casualty Ins. v. Yodice*, 714 N.Y.S.2d 715, 717 (N.Y. App. Div. 2000) ("[W]here the certificate states that it is provided as a matter of information and confers no rights upon the certificate holder . . . the certificate is simply notice to the insured that a policy has been issued); *Kaufman v. Puritan Ins. Co.*, 511 N.Y.S.2d 307, 308 (N.Y. App. Div. 1987).

Along these lines, state legislatures have recognized that COIs are not insurance policies and cannot affect the terms of the underlying policy. *See, e.g.*, Idaho Code Ann. § 41-1850(1) (defining "certificate of insurance" as not including a policy of insurance); Kan. Ins. Bulletin 2010-2 (Aug. 30, 2010) ("The certificate cannot vary the terms of the policy [to require notice of cancellation]").

In sum, the overwhelming weight of authority from across the country supports the baseline principle, well-established under Washington law, that a COI "is not the equivalent of an insurance policy"—and that it is therefore unreasonable to rely on a COI as legally conferring any benefits of the underlying policy. *See Postlewait,* 106 Wn.2d at 100–01, 720 P.2d at 807.

C. The Fact that VDG Issued the COI Does Not Affect the Coverage Analysis.

Ultimately, the mere fact that Selective's authorized agent, VDG, utilized the ACORD 25 COI form that listed T-Mobile USA as an additional insured—without more—cannot create coverage as a matter of law. Indeed, the supposed tension in this case between principles of agency law and insurance law was addressed directly, and resolved in favor of the insurer, in a case somewhat analogous to this one, *Bituminous Casualty Corp. v. Aetna Life & Casualty,* No. 2:96-2152, 1998 U.S. Dist. LEXIS 23161 (S.D. W. Va. Sept. 24, 1998).

Bituminous was an insurance coverage dispute over an underlying wrongful death action. Lambert, a truck driver, was employed by Continental Trucking. *Id.*, at *3. Continental Trucking had an agreement with Battle Ridge, a mining company, to transport coal. *Id.* Lambert was killed in an automobile accident while hauling a load of Battle Ridge's coal. *Id.* After a government investigation determined that the accident was caused by (among other things) faulty brakes and an oversized load, Lambert's widow sued Continental Trucking and Battle Ridge. *Id.* Battle

Ridge was insured under a policy provided by Bituminous Casualty, and Continental Trucking was insured, as relevant here, under a policy provided by Aetna Life & Casualty ("Aetna"). *Id.* at *4-5.

Before the accident, Continental Trucking had contacted an insurance agent, the Lewis Agency, and requested that Battle Ridge be added as an insured under the Aetna policy. *Id.* at *5. The Lewis Agency acted as an authorized agent for Aetna, and issued COIs for Aetna in that role. *Id.* The Lewis Agency issued a COI on an ACORD form that listed the named insured as Continental Trucking, Aetna as the insurer, and Battle Ridge as an additional insured. *Id.* at *6. However, Battle Ridge was never added as an additional insured under the Aetna policy, and consequently Aetna denied Battle Ridge's demand for coverage as an additional insured. *Id.* at *7-8. Once the underlying lawsuit settled, Bituminous Casualty sought contribution from Aetna, arguing that the COI made Battle Ridge a named insured under the Aetna policy. *Id.* at *8-9.

The court rejected Bituminous Casualty's argument. The court accepted that the Lewis Agency was Aetna's agent, and that it therefore had the authority to bind Aetna to insurance agreements. *Id.* at *10-11. But, despite having the authority to bind Aetna, the Lewis Agency's mere issuance of the COI did not provide coverage for Battle Ridge. *Id.* at *19. The court, synthesizing the majority view of other courts that considered this issue, determined that where a "policy conclusively established that the entity to be added was never named as an additional insured," a COI "was insufficient, by itself, to establish that the added entity was covered by the

policy." *Id.* at *12 (citing *Am. Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 248 A.D.2d 420, 671 N.Y.S.2d 93, 96 (1998)).

The court's reasoning was supported by other New York State and federal cases. *See Penske Truck Leasing Co, v. Home Ins. Co.*, 251 A.D.2d 478, 674 N.Y.S.2d 400 (1998) (COI indicating it was issued as matter of information only and transferred no rights to the certificate holder was insufficient to establish coverage); *McGill v. Polytechnic Univ.*, 235 A.D.2d 400, 651 N.Y.S.2d 992 (1997) (COI was insufficient, by itself, to show that subcontractor purchased insurance naming general contractor as additional insured as required by contract where the COI expressly stated that it was a "matter of information only and conferred no rights" on general contractor); *McKenzie*, 772 F. Supp. at 148-49 (issuance of COI with similar disclaimer does not act to provide coverage to party not named on policy).

The court's reasoning was also supported by two federal circuit court cases. *See Taylor*, 742 F.2d at 711-12 (holding that COI contradicting underlying insurance policy did not provide coverage because COI "was simply notice to [the plaintiff] that a policy of insurance had been issued," and that "language of the policy controls" where "certificate or endorsement states expressly that it is subject to the terms and conditions of the policy"); *Mountain Fuel Supply*, 933 F.2d at 889 ("The majority view is that where a certificate of insurance, such as the ACORD certificate, expressly indicates it is not to alter the coverage of the underlying policy, the requisite intent is not shown and the certificate will not effect a change in the policy.").

Bituminous accords with Washington law, which has never distinguished between COIs issued by insurers or agents. There is no material difference between West Virginia's agency principles and Washington's. *Compare Bituminous*, 1998 U.S. Dist. LEXIS 23161, at *11 ("'[T]he actions and statements of an agent who has actual authority to enter into a contract on behalf of a principal will bind the principal to all the elements in that contract, even though the particular statements may have been unauthorized.'" (quoting *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295, 299 (W.Va. 1983))) *with Chicago Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 136, 309 P.3d 372, 379 (2013) ("[A]n insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of [the agent's] real or apparent authority."). As *Bituminous* and the cases it cites illustrate, the issuance of a COI by way of the ACORD 25 form—disclaimers and all—does not amount to an "act[], contract[], or representation[]" sufficient, as a matter of law, to bind an insurance company. *See Chicago Title*, 178 Wn.2d at 136, 309 P.3d at 379. This conclusion is buttressed by insurance industry practices surrounding ACORD 25 forms, and by the numerous courts and legislatures recognizing that a party may not reasonably rely on a COI containing the sorts of unambiguous disclaimers present here.

D. Strong Public Policy Concerns Weigh Against Permitting a COI to Override the Explicit Terms of an Insurance Policy.

An affirmative answer to the certified question would create utter chaos in the insurance industry, as explicit policy terms—heretofore preserved by unambiguous disclaimer language in COIs—could be overridden due to misrepresentations of coverage or other critical policy provisions that do not reflect the bargained-for reality embodied by the policy. Giving legal effect to an agent's misrepresentation (innocent or otherwise) on a COI of who is covered under a particular policy, even if this misrepresentation conflicts with the express terms of the policy, would ensure that such "information-only" COIs—rather than fundamental insurance policy terms like the length of the policy term, the scope, or the limits—control the scope of coverage. In essence, this would permit the COI to completely supplant the policy terms. The havoc that such a holding would wreak upon the industry cannot be overstated.

Indeed, APCIA's predecessor organizations spent considerable time working within the framework of ACORD's drafting process to preserve and strengthen similar disclaimer language in the ACORD 28 form ("Evidence of Commercial Property Insurance"), in response to a concerted effort by the mortgage brokerage community to give the form the force of law as a summary—even an incorrect one—of lengthy and complex insurance policies. The property and casualty insurance industry opposed this effort to weaken the disclaimer language in order to avoid having even innocent misrepresentations override the explicit terms of an insurance policy.

If fundamental contract certainty can be so easily undermined, individual insurers will presumably be forced to consider declining to authorize the use of any COIs, which would represent an unfortunate—and unnecessary—end to the use of a tool that many stakeholders find useful when appropriately limited to its intended use as an "information-only" communication that clearly explains that status.

VI. CONCLUSION

APCIA respectfully requests that this Court answer the Ninth Circuit's certified question in the negative and determine that the COI issued by VDG to T-Mobile USA did not, as a matter of law, create coverage.

Respectfully submitted this 1st day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 1st day of April, 2019.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

CARNEY BADLEY SPELLMAN

April 01, 2019 - 2:21 PM

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